

JOEDY KANNIAH

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v.

POLIKLINIK & HOSPITAL VETERINA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR

b

ABDUL KADIR SULAIMAN J

[ORIGINATING MOTION NO. R1-25-10-96]

29 OCTOBER 1997

CIVIL PROCEDURE: *Pleadings - Parties bound by pleadings - Whether rule applicable to tribunal hearings*

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ADMINISTRATIVE LAW: *Judicial review - Award of Industrial Court - Whether tribunal made error of law - Discrepancy in pleadings and statement - Whether tribunal erred in dismissing applicant's claim*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Whether could be granted - Whether tribunal exceeded in its limited jurisdiction in dismissing applicant's claim*

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The applicant alleged that he had been dismissed without just cause or excuse, by the 1st respondent, and under the Industrial Relations Act 1967, s. 20 ('the Act'), his representations were heard before the Industrial Court. His claim was dismissed on the ground that he had resigned from the company, on his own accord. The applicant, being disappointed with the award, filed a motion for leave to apply for *certiorari* to quash the award and for *mandamus* to have the reference on his representation heard by another division of the Industrial Court. The issue that was before the court was, whether the Industrial Court, in handing down the award had committed any error of law.

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Held:

[1] Parties to an action are bound by their pleadings and this includes proceedings before the Industrial Court. The pleadings of the applicant stated that he was dismissed on 1 June 1993 but in the reference before the Industrial Court, it was stated that the dismissal was on 3 June 1993. Therefore the Industrial Court was not in error in holding that it was uncertain as to when the applicant was actually allegedly dismissed. Even on this ground alone the applicant's claim could have been dismissed by the Industrial Court.

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[1a] With the evidence of the applicant contradicting his own pleading in the statement of case, the court was of the opinion that no reasonable tribunal would have allowed his claim, for being dismissed without just cause or excuse by the 1st respondent.

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- a* [2] The applicant's application for *certiorari* or *mandamus* was not a proceeding on appeal from a decision of a lower court or tribunal. With such an application, the court was concerned with the error in law committed by the Industrial Court, which could have exceeded its limited jurisdiction given by the statute creating it.
- b* [2a] From the facts of what took place before the Industrial court, the court could not find anything to hold that the Industrial Court had committed any error of which affects its jurisdiction to require the court to grant the orders sought by the applicant.
- c* [2b] In the light of the evidence before the Industrial Court, it could not be said that the decision of the Industrial Court was so unreasonable, that no reasonable tribunal similarly circumstanced would have arrived at the decision which was sought to be impugned.
- d* [3] The court, in the exercise of its power in judicial review, found no basis or ground sufficient to upset the decision made by the Industrial Court in its award.

[Application dismissed with costs.]

Cases referred to:

- e* Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 (*refd*)
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 (*refd*)

Legislation referred to:

- f* Industrial Relations Act 1967, ss. 2, 20(1), (3)
For the applicant - Jeyapalan Mahesan (Selva Balan Sinnan with him); M/s Clough Thuraisingham & Jeya Mahesan
For the respondent - A Ramadass (Srividhya Ganapathy with him); M/s Ramadass & Assoc
- g* Reported by Michele Saw

JUDGMENT

Abdul Kadir Sulaiman J:

- h* The applicant, a doctor/consultant considered that he had been dismissed without just cause or excuse by the first respondent. Accordingly, he made representations to the Director-General of the Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 (hereinafter referred to as 'the Act'. As there was no likelihood that the representations being settled, the Director-
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General notified the Minister accordingly. Having considered the matter, the Minister acting under s. 20(3) thereof referred the representations to the second respondent. Upon the reference the second respondent handed down Award No. 526 of 1995 dismissing the claim of the applicant on the ground that he had resigned from the company on his own accord. *a*

Being aggrieved with the said award, the applicant on 2 April 1996 filed a motion for leave to apply for an order of *certiorari* to quash the said award and for an order of *mandamus* to have the reference on his representations heard by another division of the Industrial Court. Leave to apply for such orders was granted by this court on 19 March 1996. On the hearing of the substantive motion, both parties agreed that their submissions would be done by writing instead of an oral one. *b*
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According to the reference by the Minister to the Industrial Court pursuant to s. 20(3) of the Act, the date of the alleged dismissal of the applicant was given as 3 June 1993. The applicant must have given this date to the Director General when he made his representations and this date must have been subsequently communicated to the Minister who in turn referred the representations to the Industrial Court for an award. There was no suggestion by the applicant that this date was wrongly quoted by the Minister. However, in his statement of case to the Industrial Court, the applicant as the claimant stated that he was dismissed without just cause and excuse on 1 June 1993. This to some extent forms the ground for the Industrial Court to hold that on 1 June 1993 the applicant resigned from the company on his own accord. *d*
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Before the Industrial Court both sides confirmed that they were on cordial working relationship and both agreed that the issue of the alleged dismissal was not on account of any misconduct on the part of the applicant. So the issue rightly determined by the Industrial Court was whether the applicant was dismissed by the first respondent and if so on what particular date or whether the applicant resigned from the company on his own accord. *f*

The applicant joined the first respondent on 14 September 1992 as a licensed practitioner with a salary of RM1,800 per month plus other benefits. Later his salary was increased to RM2,000 per month. The contract of service was an oral one. On 30 May 1993 there was a meeting arranged by the first respondent with the applicant over the complaint received by the first respondent from its clients against the applicant. The applicant became annoyed over the complaint and indicated his own decision to leave the service of the first respondent. There was no indication from the first respondent that the applicant should leave the service. It was only the contention of the applicant that there was a hint from the first respondent that he should leave. Such being the case it was the view correctly held by the Industrial Court that the *g*
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- a* applicant should prove that he was in fact dismissed by the first respondent. This he has failed to establish. In fact when the applicant indicated that he wanted to resign from the practice, the proprietor of the first respondent persuaded him that he should stay on. Thereupon both the proprietor and the applicant agreed that the latter was to do only locum in the first respondent's clinic with effect from 1 June 1993. Both parties then mutually agreed to do away with the unwritten contract of service up to 30 May 1993. According to the applicant in his evidence before the Industrial Court, locum is only temporary and work was only on specified period. On this status of a locum the Industrial Court determined it to be not a workman as envisaged by s. 2 of the Act.

- c* In para. 6 of his statement of case, the applicant alleged that his working relationship with the first respondent was in order until February 1993 but it changed after that by the employer being rude, throwing books and kicking chairs to show his anger towards the applicant. However, before the Industrial Court in cross-examination he said, "I have no evidence to prove in respect of para. 6 statement of case". In the circumstances it was the decision of the Industrial Court that whatever the applicant said was not at all truthful. Then at p. 5 of the impugned award the learned Chairman of the Industrial Court has this to say:

- e* The claimant alleged that he was dismissed on 1 June 1993 as in his pleading and if this was so why did he continue working in the company as a locum from 1 June 1993 to 3 June 1993. This shows that the claimant had mutually agreed to remain in the company as a locum in the absence of anything to the satisfaction of the court, whether oral or written, that he was dismissed on 30 May 1993 to be effective on 1 June 1993.

- f* There is substance in what the learned chairman said as quoted above. The learned chairman then considered the date of his purported dismissal as supplied to the Minister in his reference to the Industrial Court being 3 June 1993. This is what the learned chairman said at p. 5 of the award:

- g* However in the reference from the Minister was that the claimant was allegedly dismissed on 3 June 1993 and if that was so his employment with the company was only as a locum which is considered temporary and was not a workman within the meaning of s. 2 of the Industrial Relations Act 1967. As such he is not eligible to make a claim under s. 20(1) of the said Act and to make a claim for reinstatement.

- h* Even if, but only if, the Court has jurisdiction to entertain his claim for reinstatement, the Court itself is uncertain when actually the claimant was allegedly dismissed as he (the claimant) was not sure of when he was dismissed. In his pleading he stated 1 June 1993, whereas in the reference by the Minister it was on 3 June 1993 and after he had left the locum service he

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said that the company must have planned to dismiss him on 30 May 1993. The date, 3 June 1993, must have been told by the claimant to the relevant government authority but he overlooked the fact that in his statement of case he had pleaded the date of his dismissal as 1 June 1993. Even in his CO4 there was nothing stated when he was allegedly dismissed. a

From his submission he seemed to suggest that he was constructively dismissed but this was not pleaded in his statement of case, neither could the court be able to deduce from the Minister's reference. It is trite law that for the claimant to plead constructive dismissal, the burden is on him to prove that there was a breach of contract serious enough for him to bring the contract to an end as enunciated in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92. It is the decision of this Court that the claimant has not discharged the burden of proving constructive dismissal that the company has breached a fundamental term. b

The hearing before the Industrial Court is based on a statement of case by the workman and a statement in reply by the employer. Each is the pleading by the party. It is trite law that parties to an action are bound by their pleadings and this includes proceedings before the Industrial Court. Therefore, on the pleading of the applicant he was dismissed on 1 June 1993. But the basis of the proceedings before the Industrial Court is the reference by the Minister to it under s. 20(3) of the Act. This reference was in respect of the alleged dismissal of the applicant on 3 June 1993. Since the allegation of the applicant by his pleading that he was dismissed on 1 June 1993 instead of 3 June 1993, the Industrial Court was not in error in holding that it was uncertain as to when the applicant was actually allegedly dismissed and on this ground alone his claim could have been dismissed by the Industrial Court. In his answer to cross-examination, the applicant had said that as far as he was concerned he was not terminated on 1 June 1993 as he was still being employed by the first respondent but on different terms and conditions. This evidence indeed contradicts his own pleading in the statement of case. Further, he even admitted that he was a locum from 1 June 1993 up to 3 June 1993 but on 3 June 1993 he told the proprietor of first respondent that he wanted to leave the practice and asked for his locum fees. Despite the persuasion by the employer to stay on he refused leaving the employer with no choice but to pay him his dues. With those evidence before the Industrial Court, no reasonable tribunal would have allowed his claim for being dismissed without just cause or excuse by the first respondent. c
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This proceedings by way of application for *certiorari* or *mandamus* is not a proceedings on appeal from a decision of a lower court or tribunal. Even on an appeal, with such an evidence before the Industrial Court, the applicant will not succeed in his appeal. But with the process of *certiorari* or *mandamus* what concerns the court is with the error in law committed by the tribunal i

- a* such as the Industrial Court so as to have exceeded in its limited jurisdiction given by the statute creating it. From the above detail analysis of what took place before the Industrial Court, I cannot find anything to hold that the Industrial Court in handing down the impugned award had committed any error of law which affects its jurisdiction to require this court to grant the orders
- b* sought by the applicant. In the light of the evidence before the Industrial Court, it cannot be said that the decision of the Industrial Court is so unreasonable that no reasonable tribunal similarly circumstanced would have arrived at the decision sought to be impugned or for that matter any error of the sort mentioned in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 AMR 1601. I have considered with utmost care the written
- c* submissions by the learned counsel for the applicant in particular and I cannot find any basis or ground sufficient to upset the decision made by the Industrial Court in its award in exercise of my power in judicial review. In the circumstances, this application of the applicant is dismissed with costs.

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